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In the

Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., *et al.*,

Appellants

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

STATE APPELLANTS' REPLY BRIEF ON THE MERITS

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In accusing appellants of disregarding *Shaw v. Reno*, 509 U.S. 630 (1993), appellees point to the wrong party; it is *appellees*, not the State, who expressly urge this Court to revise *Shaw*.[1] Appellees propose a drastic revision of the "predominance" test applied in *Shaw* and its progeny -- a revision that would eviscerate an entire body of fourteenth and fifteenth amendment jurisprudence and leave numerous state redistricting plans at risk of invalidation.

The State has not asked this Court to overrule or modify *Shaw*. In fact, the State Legislature has fully complied with *Shaw* by using non-racial factors to develop its redistricting plan. Appellees' selective use of the record and inferences drawn from mere appearances do not prove otherwise. In light of appellees' deficient showing on summary judgment that race predominated in District 12's design, the decision below should be reversed.

ARGUMENT

I. APPELLEES' INSINUATIONS REGARDING THE LEGISLATURE'S MOTIVES ARE UNSUPPORTED, AND REVEAL THAT SUMMARY JUDGMENT FOR APPELLEES WAS IMPROPER.

In summarily invalidating a deliberate judgment of the North Carolina General Assembly, the district court held that race was the only *possible* explanation for District 12's design. (*See* Jurisdictional Statement ("JS") at 21a-22a.) This decision -- based on erroneous assumptions and scanty evidence -- reversed the burden of proof required at summary judgment,

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[1] Even the Table of Contents foreshadows appellees' intent to transform the law. While purporting to "reaffirm[] and give[] full effect" to the principles of *Shaw*, they urge this Court in the same argument section to "conform[] [*Shaw*] to other equal protection precedents" -- precedents that are inapplicable to the redistricting context. (*See* Appellees' Brief ("App. Br."), Table of Contents at I and D.)

and denied the State the opportunity to prove that partisan politics, not race, dominated the district's design.

Attempting to justify this result, appellees insist that the State's publicly declared purpose of furthering partisan political objectives by keeping an equal number of Democrats and Republicans in office was a pretext to conceal a much more nefarious agenda: to advance the interests of African-Americans by packing them into a single district, thereby ensuring the re-election of African-American Congressman Mel Watt. Proof of the Legislature's illicit motives, the Court is told, is revealed through the following:

- District 12 "fails the 'eyeball test' and other well-recognized objective tests of compactness." (App. Br. at 25.)
- Nine predominantly white precincts with heavy Democratic concentrations adjacent to District 12 were "excluded" from the district, belying the legislators' claim that boundaries were drawn based on partisan political data. (*Id.* at 34-36.)
- A single voter in a two-mile area in Precinct 77 was used as a "human link" to join District 9 and Mecklenburg County so that District 12 could avoid dividing them into two, non-contiguous parts. (*Id.* at 30.)
- The architects of the 1997 plan, Senator Cooper and Representative McMahan, were not worried about complying with *Shaw* since they publicly admitted their belief that *Shaw* only applied to majority-minority districts. (*See id.* at 14-15.)
- The State's own Section 5 submission reveals that the State rejected alternative plans because they "would seriously weaken the ability of the African-American

incumbent in District 12 (Congressman Mel Watt) to win re-election." (*Id.* at 42.)

Assuming, for the moment, that these "facts" would permit an inference that racial factors overrode traditional redistricting criteria in violation of *Shaw*, appellees' assertions cannot withstand close scrutiny, and certainly do not satisfy the stringent burden of proof required for summary judgment.

A. "Compactness."

Appellees assert that District 12 fails the "eyeball test" of compactness (App. Br. at 25).[2] The district's shape is, however, easily explained by political and geographic factors. Three such factors stand out, and provide a clear, non-racial motivation for the district's contours. First, the legitimate goal of creating a Democratic district in a largely Republican region of the State cannot be achieved by drawing a circle; the district had to be somewhat elongated, particularly since the medium-size cities in this section of the State -- Charlotte, Greensboro and Winston-Salem -- themselves stretch North and South along the Piedmont Crescent.[3] The district is "thinner" than other districts because it is in a heavily populated area of the State. Second, the Legislature had to draw the district's boundaries in such a way as to preserve not only the Democratic character of District 12 but to protect Republican incumbents, whose hometown areas abut District 12. To satisfy both parties, portions of Winston-Salem and Charlotte were divided between

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[2] It is noteworthy that the State Legislature, while making significant improvements in District 12's compactness, did not use mathematical compactness as a criterion in redistricting. (*See* Joint Appendix ("J.A.") at 132-33. *See also* State Appellants' Brief on the Merits ("St. Br.") at 6 & n.9.)

[3] In this respect, District 12 is similar to Georgia's Eleventh Congressional District, which was drawn by a three-judge court. (*See* St. Br. at 6 n.8.)

the two parties. Finally, the Legislature sought wherever possible to follow natural boundaries. Certain sections of the district's borders are jagged because the city and township lines they follow are themselves uneven. These race-neutral explanations rebut the inferences appellees draw from District 12's shape.

B. The "Nine Precincts" Not Included in District 12.

Appellees also seek to impugn the State's motives by relying on nine precincts "excluded" from District 12. By their account, these precincts are strong bastions of Democratic support -- certainly as strong as the predominantly African-American precincts included in District 12. According to appellees, there was only one possible reason for leaving them out: they were predominantly white. (*See* App. Br. at 35-36). This assertion is clearly wrong.

One threshold point must be kept in mind in evaluating appellees' charges: every district is limited by population requirements, *see Reynolds v. Sims*, 377 U.S. 533, 568, 579 (1964),[4] and thus boundaries have to be drawn *somewhere*. There will thus always be "excluded" precincts adjoining any district. To demonstrate an equal protection violation, however, appellees must do more than show that certain precincts that *could have been* included in District 12 were not. They must demonstrate that a Legislature pursuing its stated goals could not have drawn the district's boundaries the way it did. In other words, the configuration of the district must be fundamentally at odds with the Legislature's asserted goals, making their race-neutral explanations pretexts to conceal a predominantly race-based agenda. In the absence of such evidence, the legislators' stated goals must be presumed

[4] In North Carolina each district had to maintain population levels of about 552,000 people per district.

truthful.[5] (*See* St. Br. at 26 (discussing cases).) Moreover, even if appellees' precinct evidence were probative, it is limited to *nine out of 120* precincts adjoining District 12. This represents only .075 of the contiguous precincts and an even smaller percentage of precincts in the surrounding area. This isolated "evidence" would be insufficient at trial; it certainly does not satisfy the stringent burden of proof required at summary judgment.[6]

Appellees' specific claim is that nine predominantly white precincts not included in District 12 had Democratic registration rates in the 50-60% range. Of course, since the Legislature based its redistricting plan principally on *actual* voting behavior, rather than party registration data, (*see* St. Br. at 29-34), the State cannot be penalized for deviating from a criterion it did not embrace.[7] But even if the Legislature had, in fact,

[5] *See also* Paul Brest, Palmer v. Thompson: *An Approach To The Problem Of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 133-34 (1971) ("Judicial review of motivation . . . poses difficulties concerning proof, appropriate relief, and respect for the political processes -- difficulties that are quite different from, and often greater than, those inherent in the nonmotivational modes of review."); *see id.* at 129-30 ("[E]specially where the decisionmaker claims to have pursued only legitimate objectives, a judicial determination of illicit motivation carries an element of insult; it is an attack on the decisionmaker's honesty.").

[6] The district court, perhaps recognizing the weakness of appellees' position, expanded the number of precincts it considered to an additional 23 precincts with Democratic registration rates in the 50-60% range. (*See* JS at 8a-9a.) In doing so, however, the court also relied improperly on party registration data that was neither used by the Legislature nor consistent with a finding of a predominantly race-based motive.

[7] The State Legislature analyzed the results of three elections -- the 1990 United States Senate race, the 1988 Lieutenant Governor race and the 1988 Court of Appeals election -- and concluded that the registration data was unreliable. (*See* 97C-28F-4D(2) at 5-6 (Statement by Sen.

relied on party registration figures to design District 12, such data should have *confirmed* for the district court that race was not the predominant factor in the district's design. These figures demonstrate that virtually all of the contiguous precincts included within District 12 exceeded the Democratic registration figures of the corresponding precincts outside the district -- often by as much as 20% to 30%. The exhibits appellees presented below only substantiate this point. (*See* App. at 11a-13a (using appellees' exhibits N, O and P[8] to show the disparity in Democratic registration inside and outside of District 12).) Since the Legislature wanted to ensure that District 12 remained Democratic, there was no reason to put the district's electoral outcome potentially at risk by substituting precincts with lower Democratic registration rates.

Ultimately, lawmakers found precinct voting patterns dispositive. The fact is that the vast majority of precincts contiguous to District 12, including some of appellees' "excluded" precincts, were not included in the district because the voters were not reliable, election-day Democrats in the three elections the Legislature examined. Indeed, in 83 of the 120 precincts adjoining District 12 (69%), the Republican candidates swept all three elections; in 18 more precincts (15%), the Republicans won two of the three elections, and in

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Cooper) ("Party registration has little relevance at all to election outcomes. North Carolina is predominately registered Democratic, but if you look at results, it's pretty obvious . . . that many registered Democrats vote Republican.") (the transcripts of all the committee meetings and floor debates are in the court record).) For instance, in 321 of 360 elections in the 120 precincts adjoining District 12 (89%), the percentage of votes received by the Democratic candidates was less than the percentage of registered Democratic voters. (*See* Appendix ("App.") at 1a-7a (showing the results of the three elections in the 120 contiguous precincts not included in District 12).)

[8] Appellees lodged these exhibits with the Court as exhibits 2, 3 and 4. (*See* J.A. at iv.)

six additional precincts (5%), the Republicans won one election.[9] (*See* App. at 1a-7a.) That means that 89% of the contiguous precincts not included in District 12 voted *against* the Democratic candidate in at least one election.[10] Even among the 13 precincts where the Democratic candidate won all three elections, there were clear signs of emerging Republican majorities. In five of those precincts, the Democratic margin of victory in at least one election was less than 3% and in four precincts, it was less than 1%.[11] (*See id.* at 1a-7a.)

Some of the contiguous precincts that voted Democratic were not included in District 12 in order to respect natural boundaries. Since in *Shaw* the Court criticized the irregularity of the district's boundaries, the Legislature sought to respect, rather than traverse, major roads and other natural lines in its

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[9] Two of the "excluded" precincts appellees cite -- Precincts 21 and 38 in Mecklenburg County -- fall into this category. In both precincts, the Republican candidate won the Court of Appeals race. In Precinct 38, the Republican candidate also won the Lieutenant-Governor race. (*See* App. at 4a.)

[10] The extent of Republican success in the contiguous precincts not included in District 12 is graphically displayed in the Appendix at 8a-10a.

[11] The three Mecklenburg precincts cited by appellees had elections with slim Democratic margins. In Precinct 21, the Democratic candidate for Lieutenant Governor won by only 52.32% of the vote; in Precinct 10, the Democratic Court of Appeals candidate won by only 55.78% of the vote, and in Precinct 38, the Democratic Senatorial candidate won by only 54.33%. (*See* App. at 4a.) This also was true for one of the precincts in Forsyth County, the Latham Elementary School. (*See id.* at 3a.) While all three Mecklenburg County precincts cited by appellees soundly voted for the Democratic Senatorial candidate, this result only had limited probative value since the Democratic candidate had an enormous "home court" advantage as a recent Mayor of the County's largest city, Charlotte.

1997 plan.[12] For this reason, the Legislature drew District 12's boundaries in the northwestern section of Guilford County (containing three "excluded" precincts), along a natural demarcation line -- two major roads, Elm and Lee Streets. (*See* App. at 14a.) Likewise, in the northeastern section of Mecklenburg County (where three other "excluded" precincts are located), the district follows a major road, East Boulevard, west until it reaches South Boulevard, a major north-south thoroughfare in Charlotte, and then follows South Boulevard for miles without interruption. In both cases, the "excluded" precincts fell on the other side of these natural dividing lines.[13] Notably, the Legislature did not include precincts with heavy African-American populations for exactly the same reasons, belying the notion that its actions were racially motivated.[14]

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[12] District 12 traverses natural boundaries, such as creeks, railroad tracks and rivers, where the lines of a particular precinct cross them.

[13] In Forsyth County, the majority of the district's boundaries follow city lines. Had the Legislature included appellees' precincts along the western boundary, it would have been required to narrow the district in other areas to satisfy the population requirement of *Reynolds v. Sims*, 377 U.S. 533, 568, 579 (1964), which would have made it difficult to follow the city lines on the other side of the district. In addition, the Legislature wanted to protect the base of Republican incumbent Richard Burr, who lives in Winston-Salem, and thus could not allocate all of the precincts in Winston-Salem to District 12.

[14] In Forsyth County, the Legislature did not include three contiguous precincts with African-American populations from 30% to 60%, and in Guilford County, the Legislature did not include an additional such precinct. (*See* App. at 15a.) Ironically, one of the "excluded" precincts appellees highlight, the Hanes Community Center, contained a significant African-American population. As the record shows, 42% of the registered voters in this precinct are African-American. (*See* J.A. at 265.)

C. "Precinct 77."

Appellees' claim that there is a one-person "human link" between District 9 and Mecklenburg County is a red herring. Precinct 77 is an uninhabited industrial area. It is split in local districting plans, and this division has never heretofore been questioned. The reason for the land bridge was political. Neither the Republicans nor the Democrats were willing to concede to the other party all of Charlotte, the hometown of Republican incumbent Sue Myrick and Democratic incumbent Mel Watt. Charlotte had to be split between the parties. Once that division occurred, it made the most sense to connect the remaining portion of land, which housed a large segment of Republicans, to District 9. Precinct 77 was used to effect this bridge.[15]

D. "Legislative Statements."

Appellees take the public statements of Senator Cooper and Representative McMahan out of context. While it is true that these legislators expressed some doubt as to whether *Shaw* applied to districts that were not majority-minority, both lawmakers made clear that the Legislature sought to ensure that District 12 complied with constitutional norms. Indeed, immediately after the portion selectively quoted in appellees' brief, Cooper provided a number of reasons why the district would satisfy *Shaw*. (*See* J.A. at 132.)[16] McMahan also took

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[15] The "sole" voter who purportedly joined District 9 and Mecklenburg County and who would be unable to cast a ballot in secret (App. Br. at 30 & n.37.) moved away from her home on Nations Ford Road in 1993 -- the last holdout in an area that long ago had become an industrial park. She has since passed away.

[16] (*See also* 97C-28F-4D(2) at 2 (Statement By Sen. Cooper) ("The bottom line interpretation is that race cannot be the predominate factor in redistricting and that if race is used, districts must be reasonably compact.").)

pains to demonstrate the State's compliance with *Shaw*. (*See* J.A. at 121 (discussing District 12's compactness, community of interest and ability to protect the Democratic incumbent).) These are not the words of lawmakers unconcerned with satisfying *Shaw*.

Appellees expressly concede that "statements made by legislators during official legislative sessions or committee meetings merit . . . consideration in determining the motive for the redistricting plan." (App. Br. at 39.) The affidavits of Cooper and McMahan clearly fall within these bounds since they accurately synthesize their statements on the General Assembly floor. (*Compare* J.A. at 131, 133 (Cooper) and J.A. at 120-21 (McMahan) *with* JS at 73a-74a (Cooper Aff. ¶¶ 8-9) and JS at 81a-82a (McMahan Aff. ¶ 7) (stating that the redistricting plan was intended to preserve the existing electoral balance).)[17] In any case, even the record citations offered by appellees confirm that the State's redistricting plan was motivated predominantly by political, not racial, considerations. For instance, appellees reference a statement by Senator Cooper that "*[t]his is a plan that attempts to preserve the partisan nature of each of the twelve districts as they now exist.*" (App. Br. at 40-41 (quoting J.A. at 133) (emphasis added).) (*See also id.* at 40 ("We said *from the beginning in the Senate* that in 1996 the people made a decision *to elect six members of Congress from the Democratic party and six members of Congress from the Republican party* . . . . ") (quoting J.A. at 131 (emphasis added)).) These statements confirm what the

[17] There also is no merit to appellees' claim that the floor debates reveal the Legislature's race-based motives. (*See* App. Br. at 42 n.45.) For instance, appellees neglect to point out either that McMahan was responding to a question by an African-American representative about the plan's impact on minorities or that he then emphasized that "we've done our very, very best considering . . . the Court's ruling" and "that we were instructed by the Court not to depend solely on race." (97C-28F-4F(1) at 16.)

Legislature has stated all along: its overarching goal was to preserve the existing electoral balance.

E. "Section 5 Submission."

Appellees also completely mischaracterize the State's Section 5 submission. Prior to the statement quoted in appellees' brief (*see* App. Br. at 42), the State made clear that the three alternative plans discussed failed to further the Legislature's partisan agenda.[18] Moreover, there is nothing surreptitious about the State's discussion of the impact its redistricting plan would have on minorities. The State was merely following its obligation under the Voting Rights Act to obtain preclearance for any change in voting procedure -- a process that required the State to show that its redistricting plan would "not have the purpose [or] effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1994). Appellees' assertion that the State's unlawful racial agenda is exposed because "[s]ignificantly this [Section 5] discussion is in terms of race -- not political party," is dumbfounding. (App. Br. at 42.) *Of course*, the State's discussion was oriented toward race; race, not politics, governs a Section 5 analysis. The State's submission demonstrates nothing more than that it complied with Justice Department regulations, which require a variety of racial information.[19]

[18] (*See* J.A. at 94 ("Representative Michaux's amendments were rejected because they did not preserve the partisan balance in House Bill 586 . . . . Plan B would have placed two Democratic incumbents in the same district . . . . All three plans . . . would have placed two Republican incumbents together in District 6 . . . .").)

[19] *See, e.g.*, 28 C.F.R. § 51.27(n) (1998) (requiring a discussion of the "anticipated effect of the change on members of racial or language minority groups"); *id.* § 51.28(b) (1998) (requiring maps showing the location of racial and language minority groups); *id.* § 51.28(a)(3) (1998) (requiring estimated population data, "by race and language group," made in connection with the adoption of the change); *id.* § 51.28(d)(2),

In short, appellees failed to establish before the district court that the design of District 12 was motivated predominantly by race and that traditional redistricting criteria were subordinated. The decision below must therefore be reversed.

II. THE LEGISLATURE FULLY SATISFIED THE CONSTITUTION BY CURING THE DEFECTS IN ITS 1992 PLAN.

Appellees' recitation of the law is as unpersuasive as their account of the "facts." They claim that the Legislature's 1997 redistricting plan should be struck down because it used its invalidated 1992 plan as the touchstone for its new design, rather than "the 1982 redistricting plan, which had not been tainted by a predominant racial motive." (App. Br. at 22.) In support of this novel position, they trumpet language in school desegregation cases mandating the elimination of "all vestiges of state-imposed segregation," and in fourth amendment cases denying access to improperly obtained evidence as the "fruit of the poisonous tree." (*Id.* at 21.) Appellees' reliance on these precedents is completely off-base. Nowhere do these cases compel a state seeking to remedy its prior unconstitutional acts to scrap its entire system when a more narrowly tailored approach would cure its constitutional violations.

In seeking to develop a plan that would pass constitutional muster, the Legislature did what other courts and legislatures had done: retained the core of its prior redistricting plan, and took those steps necessary to correct the constitutional violations. Even with this conservative approach, however, the State made dramatic changes: District 12 retained less than 70 percent of its original population and only 41.6% of its original

(6) (1998) (requiring race-based electoral data). (*See also* JS at 63a-67a and J.A. at 89-110 (portions of the State's Section 5 Submission.)

geographic area, increasing its geographic compactness significantly. (*See* St. Br. at 5.)

Appellees' condemnation of this approach betrays a fundamental misunderstanding of the Court's precedents. In case after case, this Court not only has permitted, but instructed, lower courts to design redistricting plans exactly the way North Carolina's legislature did. The mandate then and now is clear: make only those changes necessary to cure the defect. *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam). Indeed, in its most recent redistricting decision, *Lawyer v. Department of Justice*, 117 S. Ct. 2186 (1997), the Court approved a revised redistricting plan that retained a significant portion of the State's prior plan, including irregularities in shape and a significant number of minority voters within a particular district. *See id.* at 2191, 2193-95. Nowhere did the Court suggest that the revised plan was tainted simply by its similarity to the prior plan.

Indeed, where court-drawn redistricting plans have exceeded the scope of the constitutional violation, this Court has not been hesitant to strike them down. *See, e.g., White v. Weiser*, 412 U.S. 783, 793-94, 797 (1973) (reversing a district court's decision not to use a reapportionment plan that most closely approximated the State's prior plan, while curing the constitutional defects); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971) (reversing district court plan that failed to approximate the legislature's original policy choices).[20] Since

[20] Use of the 1982 plan would be both impracticable and severely injurious to the State's legitimate race-neutral interests. The 1982 plan contained only eleven congressional districts, while the State's current apportionment is twelve. The 1982 plan would thus have to be overhauled to account for a whole new district. Moreover, the creation of a Democratic voting district in the populous Piedmont Urban Crescent in the 1990s helped to create a partisan electoral balance, which would be undermined by a return to the 1982 plan. In addition, an attempt to return to the 1982 plan would disrupt relations between constituents and

a federal court is obligated to retain as much as possible of a prior legislative plan, while curing the constitutional defects, it is axiomatic that a state legislature that adopts the same approach acts consistent with constitutional norms. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("[A] State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause.") (quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966)).

The Court's school desegregation cases, on which appellees also rely, only confirm the validity of the Legislature's actions. Like the redistricting cases, these precedents make clear that "the scope of the remedy [must be] determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).[21] *See also Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).[22] The Court's remedial cases are premised on the understanding that a remedial plan must relate precisely to "the *condition* alleged to offend the Constitution." *Jenkins*, 515 U.S. at 88 (emphasis added). Thus, the State's 1997 plan must be evaluated against the specific harms caused by its 1992 plan.

politicians and frustrate the State's goal of maintaining incumbent representatives with seniority.

[21] For instance, in *Dayton Board of Education v. Brinkman*, the Court insisted on "a geometric congruence of right and remedy." 433 U.S. 406, 420 (1977). Vacating a sweeping desegregation decree in Dayton's school system, the Court instructed the district court on remand to "determine how much incremental segregative effect [the school board's] violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." *Id.* "The remedy," the Court emphasized, "must be designed to redress that difference." *Id. See also Freeman v. Pitts*, 503 U.S. 467, 492 (1992) (examining whether the constitutional violator "has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable").

At base, the "condition" that required curing was the use of race as the controlling factor in the design of District 12. *See Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (the constitutional wrong occurs when race becomes the "dominant and controlling" consideration); *see also Miller v. Johnson*, 515 U.S. 900, 913 (1995) (same). The State's violation was, in essence, the very act of making race the defining feature of the district's design. This excessive use of race, the Court held, created three constitutional harms: the "expressive" harm of "convey[ing] the message that political identity is, or should be, predominantly racial," *Bush v. Vera*, 517 U.S. 952, 980 (1996) (plurality opinion); the "representational" harm of causing elected officials to "believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole," *Shaw v. Reno*, 509 U.S. at 648 (1993), and the societal harm of "balkaniz[ing] us into competing racial factions." *Id.* at 657. (*See also* St. Br. at 39.)

The constitutional violation and the resulting harms were extinguished by the State Legislature's 1997 plan. First, as indicated above, the Legislature abandoned race as the predominant factor in its redistricting plan, and drew boundaries based on partisan political data. This was true not

[22] The Court's previous cases also refute appellees' claim that the State must bear the burden of disproving that its 1997 plan is unconstitutional. *See, e.g., Shaw v. Hunt*, 517 U.S. 899, 905 (1995).

only in District 12 but throughout the State.[23] The State's elevation of partisanship over race eliminated the prior "expressive" harm "that political identity is, or should be, predominantly racial." *Bush*, 517 U.S. at 980. (*See also* St. Br. at 39.) If anything, voters were left with the clear message that what matters above all is how they vote, not the way they look.

Second, by focusing on political, rather than racial characteristics, the 1997 plan extinguished District 12's majority-minority character and created a competitive, multi-racial environment in which the *entire* electorate must "pull, haul, and trade to find common political ground." *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). While the Court has never held that majority-minority districts are presumptively unconstitutional, *see Shaw*, 509 U.S. at 642, their absence creates a strong inference that race was not elevated above other, race-neutral factors. *See Lawyer*, 117 S. Ct. at 2195 ("[t]he fact that [a challenged district] is not a majority-black district . . . supports" a decision not to subject the district to strict scrutiny). Indeed, the transformation of District 12 not only erased any previous implied racial classifications, but eliminated the "representational" harm of causing candidates and elected officials to believe that their obligations were limited to any "particular racial group, rather than their constituency as a whole." *Shaw*, 509 U.S. at 648. *See Lawyer*, 117 S. Ct. at 2195 (a multiracial district "'offers to any candidate, without regard to race, the opportunity' to seek and be elected to office."). (*See also* St. Br. at 39.)[24]

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[23] It bears mentioning that this Court consistently has upheld political gerrymanders under the Equal Protection Clause. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 751 (1973).

[24] (*See* Brief *Amici Curiae* of Congresswoman Corrine Brown, Congressman John Lewis, Congresswoman Cynthia McKinney and the Democratic Congressional Campaign Committee Supporting Appellants ("Brown Br.") at 2-3, 18-19.)

Third, as amici Congresswoman Corrine Brown, *et al.*, have pointed out, the State drew district boundaries using race-neutral precinct lines.[25] Unlike all of the other redistricting plans this Court has invalidated,[26] the State did not use the smaller, geographic unit of census blocks, which contain only population and racial statistics. As units the size of street blocks, census blocks can easily be manipulated to further racial agendas.[27] The State's decision to use precincts, rather than census blocks, made it easier to group voters based on shared political interests expressed through voting behavior, rather than racial identity.[28] Their reliance on a race-neutral organizing principle ensured that voters would not be "balkanize[d] . . . into competing racial factions," *Shaw*, 509 U.S. at 657.

III. APPELLEES CAN DEFEND THE COURT'S DECISION ONLY BY REWRITING THE TEST OF *SHAW v. RENO*.

Despite the Court's consistent application of the predominance test in redistricting cases, appellees urge the Court to reject it in favor of an entirely different standard utilized in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977), to address claims of invidious discrimination. (*See* App. Br. at 19-20.)

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[25] (*See* Brown Br. at 14-18.)

[26] (*See id.* at 13 & n.8.)

[27] *See Bush*, 517 U.S. at 961-64, 966-67, 973-76 (plurality opinion). (*See also* Brown Br. at 12-13.)

[28] Census tract data, which follow easily identified natural or man-made lines such as streets, roads and highways, also is an acceptable, race-neutral method of drawing boundary lines. (*See* Brown Br. at 12-18.) In North Carolina, precinct lines comported with census tracts.

Appellees' eagerness to fundamentally transform the Court's jurisprudence betrays an implicit recognition that application of the predominance test, alone, is insufficient to invalidate the 1997 plan. But the alternative they offer up -- a transposition of the *Arlington Heights* test -- would require redistricting plans to be struck down not because race was the predominant factor in the district's design, but if race was simply "*a* motivating factor." *Arlington Heights*, 429 U.S. at 265 (emphasis added). Once a plaintiff could demonstrate any consideration of race, the burden would then "shift[] to the law's defenders to demonstrate that the [plan] would have been enacted without this factor." (App. Br. at 19-20.)

Appellees' transparent effort to rewrite *Shaw* should be squarely rejected. In the redistricting context, the Court has never treated any trace of race as a carcinogen. *See Shaw*, 509 U.S. at 642 (emphasizing that the Court "never has held that race-conscious state decision-making is impermissible in *all* circumstances"); *Bush*, 517 U.S. at 958 (plurality opinion) (strict scrutiny "does not apply to all cases of intentional creation of majority-minority districts"). That is because the harms identified in the Court's previous cases, *see supra* at 14, are present only "when race becomes the 'dominant and controlling' consideration" in redistricting. *Shaw v. Hunt*, 517 U.S. at 905. Only through the excessive use of race are voters stigmatized or divided into racial factions or legislators sent the message that they need not represent the constituency as a whole.[29] *See Shaw*, 509 U.S. at 647-48, 657.

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[29] *See also Shaw v. Hunt*, 517 U.S. at 931 (Stevens, J., dissenting): Unlike many situations in which consideration of race itself necessarily gives rise to constitutional suspicion, see, *e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), our precedents have sensibly recognized that in the context of redistricting a plaintiff must demonstrate that race had been used in a particularly determinative manner before strict constitutional scrutiny should obtain.

Moreover, as a practical matter, it is simply not feasible to create a completely "color-blind" redistricting process. *See Shaw*, 509 U.S. at 646 (recognizing that "redistricting differs from other kinds of state decisionmaking" since the legislature "always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors"). A requirement that a State demonstrate that a redistricting plan would have been enacted without *any* consideration of race would place countless state redistricting plans at risk. *See McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973) ("[T]he removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute.") As two scholars have noted:

> If the *Arlington Heights* test were applied straightforwardly, the state would virtually never be able to defend a plan from invalidation, since it is hard to imagine how it could ever show that the legislature would have adopted precisely the same plan had it been entirely unaware of the racial distribution of voters.[30]

The test set out in *Shaw* and its progeny adequately checks improper racial classifications while respecting state processes and the political realities in which redistricting decisions are made.

As if appellees' attempt to persuade the Court drastically to revise *Shaw* were not enough, they urge the invalidation of the State's plan as the "fruit of the poisonous tree" even without "a specific finding as to the race-based motive for [the district's] design." (App. Br. at 47.) Not only would such a result patently contravene established case law, but it would make it exceedingly difficult for States whose plans had once

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[30] Pamela S. Karlan & Daryl J. Levinson, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting*, 84 Cal. L. Rev. 1201, 1214 (July 1996).

been struck down to enact a revised plan that could survive fresh judicial review. Appellees' approach could have the effect of permitting a court to uphold a plan offered by a state *ab initio*, and to reject the identical plan if drawn by a previous constitutional offender. Since federal courts are admonished to respect prior legislative plans once constitutional violations have been cured, giving state legislatures less freedom than courts are accorded would create a *perverse incentive for legislatures to forego enacting any plan and simply turn remedial redistricting over to the federal courts*.

Ultimately, appellees' position reduces to a single claim: District 12 is racially imbalanced. In so arguing, appellees rely on an "effects" test that was repudiated in *Washington v. Davis*, 426 U.S. 229, 240 (1976) (invidious discrimination "must ultimately be traced to a racially discriminatory purpose"). Far from meeting their heavy burden of proof at summary judgment, appellees failed to offer credible evidence that District 12's design was "'unexplainable on grounds other than race.'" *Shaw*, 509 U.S. at 644. The decision below should therefore be reversed.

CONCLUSION

For the reasons stated, the Court should reverse the grant of summary judgment to appellees and remand for entry of judgment in favor of the State or, in the alternative, remand for trial.

Respectfully submitted,

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December 29, 1998

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APPENDIX

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TABLE OF REPUBLICAN VICTORIES IN PRECINCTS ABUTTING DISTRICT 12

Precinct No./Name	% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
GUILFORD COUNTY Precincts Abutting District 12					
1103 Jamestown-3	39.64	16.48	27.11	25.80	**3**
0221 HP-21	45.10	38.35	38.51	35.36	**3**
0218 HP-18	47.98	27.16	32.20	32.84	**3**
0214 HP-14	55.73	27.53	37.56	40.38	**3**
0204 HP-04	45.74	33.96	40.55	32.26	**3**
0209 HP-09	55.29	38.87	46.81	45.30	**3**
0217 HP-17	53.03	47.42	46.88	43.61	**3**
0220 HP-20	41.43	39.12	36.06	29.73	**3**
0223 HP-23	42.89	37.27	36.67	32.07	**3**
0802 Friendship-2	51.13	31.34	38.64	33.55	**3**
3124 GB-24C	32.86	56.56	47.92	43.58	2
0122 GB-22	52.08	55.40	48.58	43.22	2
0143 GB-43	51.76	56.42	47.04	43.81	2
0123† GB-23	59.68	50.59	51.95	51.38	0
0117†• GB-17	61.86	65.08	61.68	58.19	0
0114†• GB-14	58.14	86.91	65.66	63.92	0
0111†• GB-11	62.32	67.51	61.68	52.98	0
0112† GB-12	60.21	43.62	52.73	34.81	2
0128† GB-28	56.74	44.34	50.78	39.31	2

Precinct No./Name	% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
GUILFORD COUNTY Cont....					
2135 GB-35B	43.54	46.81	48.87	38.09	3
3135 † GB-35C	66.22	66.40	49.01	38.13	2
1402 † South Monroe	57.27	32.72	42.73	42.51	3
1602 South Sumner	47.99	19.18	33.33	28.64	3
1202 † South Jefferson	63.29	45.76	53.37	52.26	1
0702 Fentress-2	51.94	27.77	37.41	32.14	3
1201 † North Jefferson	55.17	31.19	45.19	45.51	3
0208 HP-08	44.79	36.44	39.19	33.16	3

FORSYTH COUNTY Precincts Abutting District 12					
0303 † Bethania #3	56.78	33.83	40.66	42.45	3
0401 Broadbay #1	52.22	28.6[illegible]	38.02	37.37	3
0603 Kernersville #3	40.94	33.21	33.76	31.19	3
0801 † Middlefork #2	60.11	44.57	46.51	48.23	3
0802 † Middlefork #3	55.84	36.76	39.94	42.98	3
1436 † New Hope United Methodist Church	55.91	57.04	53.06	52.56	0
1407 Brown/Douglas Recreation	61.60	78.27	64.07	62.39	0
1403 † Bethabara Moravian Church	55.06	52.12	53.14	50.21	0
1422 † • Hanes Community Center	76.	75.77	71.68	69.18	0
1408 † • Brunson Elementary School	65.75	75.46	66.30	65.84	0

Precinct No./Name	% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
FORSYTH COUNTY Cont....					
1443 Reynolds High School Gym	57.38	58.15	54.42	50.51	0
1411 Christ Moravian Church	51.53	59.37	49.93	47.72	2
1427 † • Latham Elementary School	65.25	54.85	53.86	55.87	0
1441 † Philo Middle School	57.37	28.29	39.60	44.23	3
1413 Covenant Presbyterian Church	50.77	31.07	43.05	47.68	3
0102 Abbots Creek #2	38.27	22.38	29.84	29.00	3
1202 South Fork #2	48.69	27.63	34.24	34.17	3
0503 Clemmonsville #3	37.58	34.75	32.78	29.65	3
1202 South Fork #2	48.69	27.63	34.24	34.17	3
0102 Abbots Creek #2	38.27	22.38	29.84	29.00	3
0503 Clemmonsville #3	37.58	34.75	32.78	29.65	3

MECKLENBURG COUNTY Precincts Abutting District 12					
0601 CO 1	51.26	49.43	42.26	37.13	3
0104 † Ch. Pct. 4	54.50	51.76	42.12	38.16	2
0195 Ch. Pct. 95	50.46	60.77	48.04	43.44	2
0184 Ch. Pct. 84	53.44	64.22	48.15	46.57	2
0145 † Ch. Pct. 45	59.10	47.60	45.30	42.05	3
0105 Ch. Pct. 5	57.03	60.45	50.35	47.62	1
0133 † Ch. Pct. 33	55.72	51.07	43.87	38.67	2

Precinct No./Name		% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
MECKLENBURG COUNTY Cont....						
0134 †	Ch. Pct. 34	54.60	49.01	46.19	44.87	3
0107 †	Ch. Pct. 7	54.27	61.88	52.61	49.08	1
0135	Ch. Pct. 35	53.14	59.88	49.41	38.19	2
0147	Ch. Pct. 47	49.57	47.03	40.70	27.37	3
0118	Ch. Pct. 18	47.78	46.80	42.73	27.24	3
0101	Ch. Pct. 1	51.30	57.77	45.27	35.41	2
0108	Ch. Pct. 8	49.01	50.28	42.54	28.55	2
0120	Ch. Pct. 20	55.02	56.40	49.69	38.10	2
0110 † •	Ch. Pct. 10	63.45	73.01	62.66	55.78	0
0121 † •	Ch. Pct. 21	59.45	60.11	52.32	48.30	1
0151	Ch. Pct. 51	51.66	54.90	43.68	38.14	2
0138 •	Ch. Pct. 38	51.82	54.33	44.95	40.67	2
0137	Ch. Pct. 37	53.37	47.81	41.89	37.79	3
0150	Ch. Pct. 50	51.18	48.89	39.27	36.21	3
0159	Ch. Pct. 59	50.65	50.57	38.01	34.23	2
0158	Ch. Pct. 58	49.09	49.69	42.68	38.73	3
0176	Ch. Pct. 76	36.61	46.59	34.85	24.45	3
0192	Ch. Pct. 92	28.29	49.40	32.38	22.44	3
1601	PVL	40.83	48.38	34.25	28.40	3
1801	SC 1	51.87	47.50	48.91	36.66	3
0301 †	BER	58.82	42.90	45.58	42.97	3

Precinct No./Name		% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
MECKLENBURG COUNTY Cont....						
0179 †	Ch. Pct. 79	56.46	42.25	42.96	40.49	3
0180	Ch. Pct. 80	52.37	47.40	42.18	39.11	3
0189 †	Ch. Pct. 89	54.21	25.37	31.71	28.49	3
1401 †	OAK	59.14	30.23	26.56	34.42	3
1501	PC1	49.00	33.04	31.03	27.44	3
1001 †	LC1- North	59.22	45.18	46.65	44.74	3
0901	LEM	43.99	41.87	34.20	26.16	3

RANDOLPH COUNTY Precinct Bordering DAVIDSON and GUILFORD COUNTIES Portions of District 12						
0414	Prospect	32.02	20.64	23.14	21.02	3

DAVIDSON COUNTY Precincts Bordering District 12						
0601	Cotton	62.71	46.32	60.36	60.60	1
1110	Ward No.6	69.17	50.71	60.36	60.56	0
0502	Holly Grove	49.27	28.96	37.97	37.96	3
1101	Lexington No.1	50.68	29.94	40.98	40.63	3
1102	Lexington No.2	55.17	37.98	44.92	43.32	3
1111	Welcome	48.85	27.03	37.15	35.49	3
1606	Thomasville No.7	41.23	20.56	33.19	29.74	3
1604	Thomasville No.4	52.39	32.71	43.27	42.69	3

Precinct No./Name		% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
DAVIDSON COUNTY Cont....						
1605	Thomasville No.5	52.30	29.17	39.88	36.99	3

ROWAN COUNTY Precincts Bordering District 12						
1106	Trading Ford	57.98	37.12	47.26	46.15	3
1103	Hatters Shop	44.68	30.91	37.26	33.10	3
1102	Granite Quarry	46.99	40.13	41.65	38.80	3
0602	Faith	40.53	31.29	37.82	33.82	3
0702	Sumner	47.40	32.83	36.82	33.77	3
1114	West Ward II	57.71	42.66	47.17	48.17	3
0701	Locke	42.58	35.67	37.95	33.56	3
1104	Milford Hills	53.05	48.32	47.27	44.70	3
1301	Steele	47.37	33.18	41.43	37.88	3
0901	Mt. Ulla	55.53	36.42	43.61	44.41	3
0101	Bradshaw	48.86	29.03	38.39	34.86	3
0102	Enochville	43.86	20.78	32.37	28.87	3

IREDELL COUNTY Precincts Bordering District 12						
1501	Turnersburg	64.21	44.36	50.19	56.46	1
1101	Olin	53.69	24.60	34.50	35.10	3
0201	Bethany	51.38	33.03	30.82	34.17	3
1401	Statesville #1	61.40	41.90	38.84	41.89	3

Precinct No./Name		% Dem. Reg.	% Dem. U.S. Senate 1990	% Dem. Lt. Gov. 1988	% Dem. Ct. of Appeals 1988	Number of Republican Victories
IREDELL COUNTY Cont....						
1402	Statesville #2	55.90	41.60	38.44	39.70	3
1404	Statesville #4	62.39	44.38	43.01	46.41	3
1405	Statesville #5	62.06	40.30	40.88	43.46	3
1301	Shiloh	61.07	31.83	37.14	41.77	3
0901	Fallstown	58.82	38.25	35.12	37.69	3
0701	Davidson	46.05	36.45	32.07	29.96	3

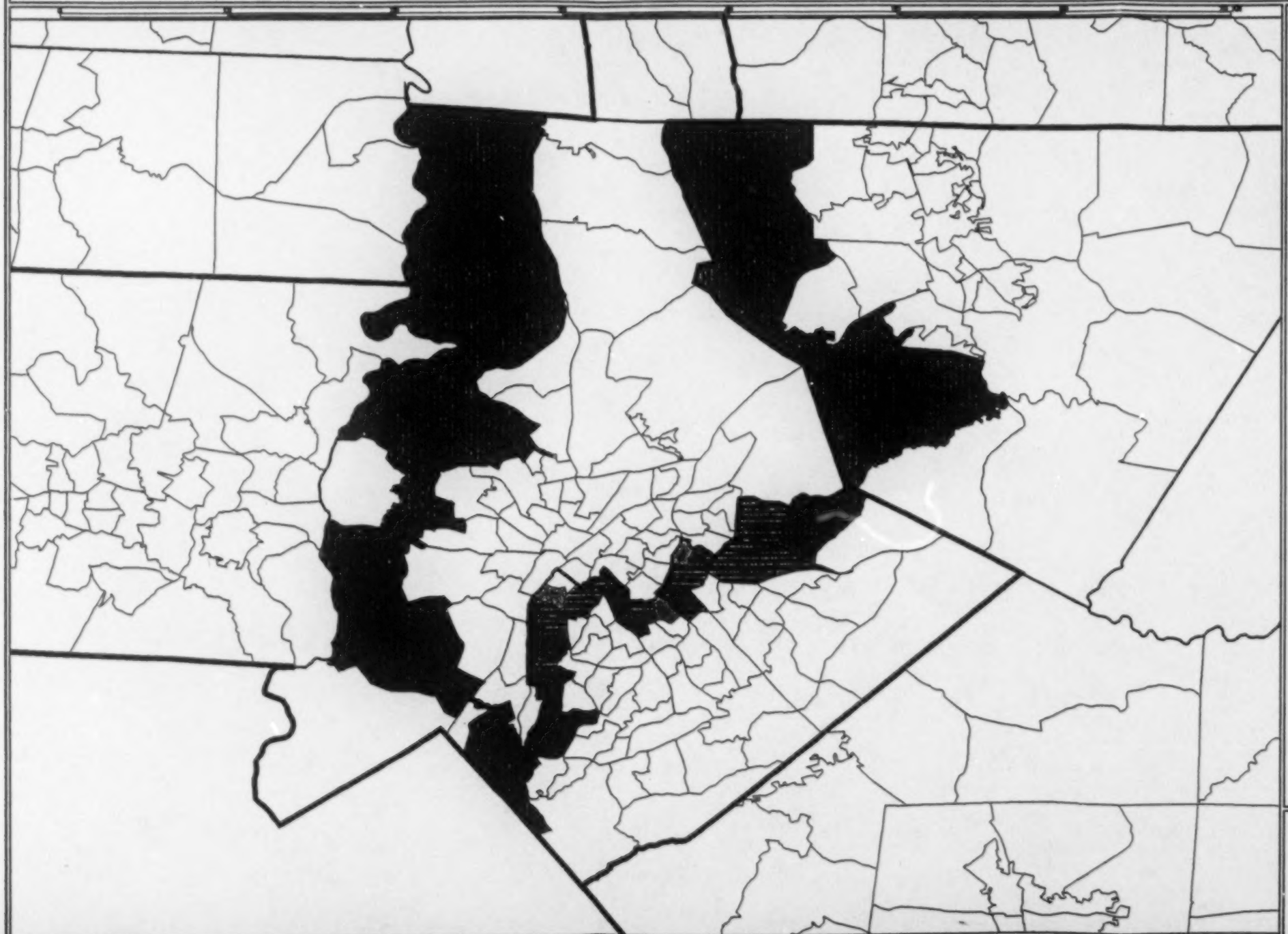
CABARRUS COUNTY Precincts Bordering District 12						
0301	Township 3	49.73	31.54	40.28	37.20	3
0204	Township 2 Box 4	37.80	33.20	36.84	34.17	3
0203	Township 2 Box 3	41.68	32.48	36.75	34.26	3
0103	Township 1 Box 3	49.59	30.89	37.69	36.64	3
0101	Township 1 Box 1	42.37	42.03	36.43	33.00	3

† Precincts cited by district court (JS at 8a - 9a)
• Precincts cited in McGee Affidavit (JA at 257-76)

NOTES: The data in this Table includes: (a) 1990 Democratic voter registration data; (b) 1990 Gant-Helms U.S. Senate election results; (c) 1988 Rand-Gardner Lt. Governor election results; and (d) 1988 Lewis-Smith Court of Appeals election results. The data is provided for each precinct abutting District 12, except for that portion of the District boundary which is coterminous with Davie County and for which no precinct level data is available in the data base.

SOURCE: The data in this Table is from the North Carolina General Assembly's redistricting computer data base, the same source of the data relied on in the affidavit of Martin B. McGee.

Republican Victories in Mecklenburg/Cabarrus County Precincts Abutting District 12



LEGEND

- County Boundary
- [illegible] Boundary
- Dist. Boundary (H93)
- Dist. Boundary (C004)

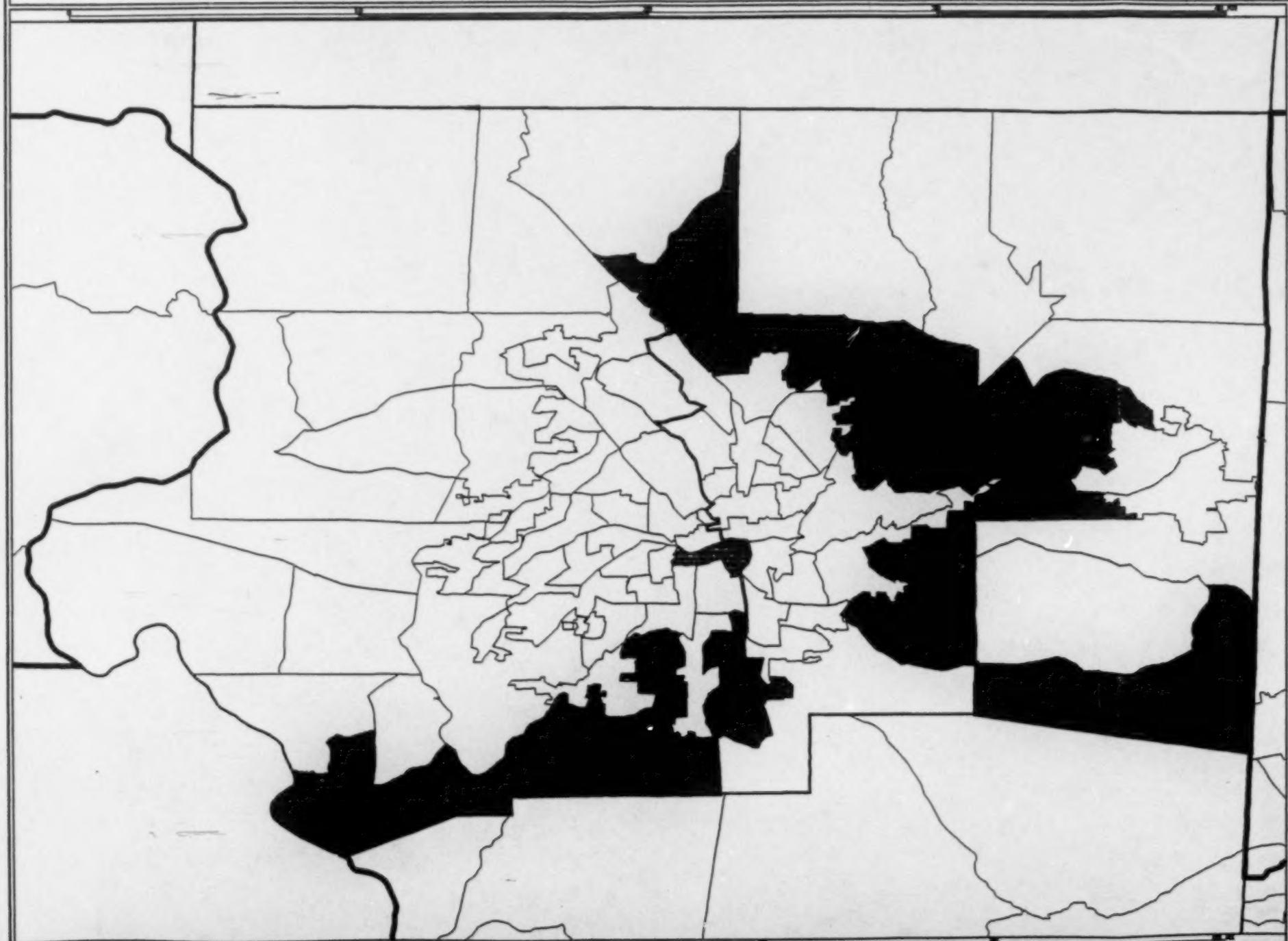
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

8a

December 22, 1998

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
Software Copyright 1990
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Republican Victories in Forsyth County Precincts Abutting District 12



LEGEND

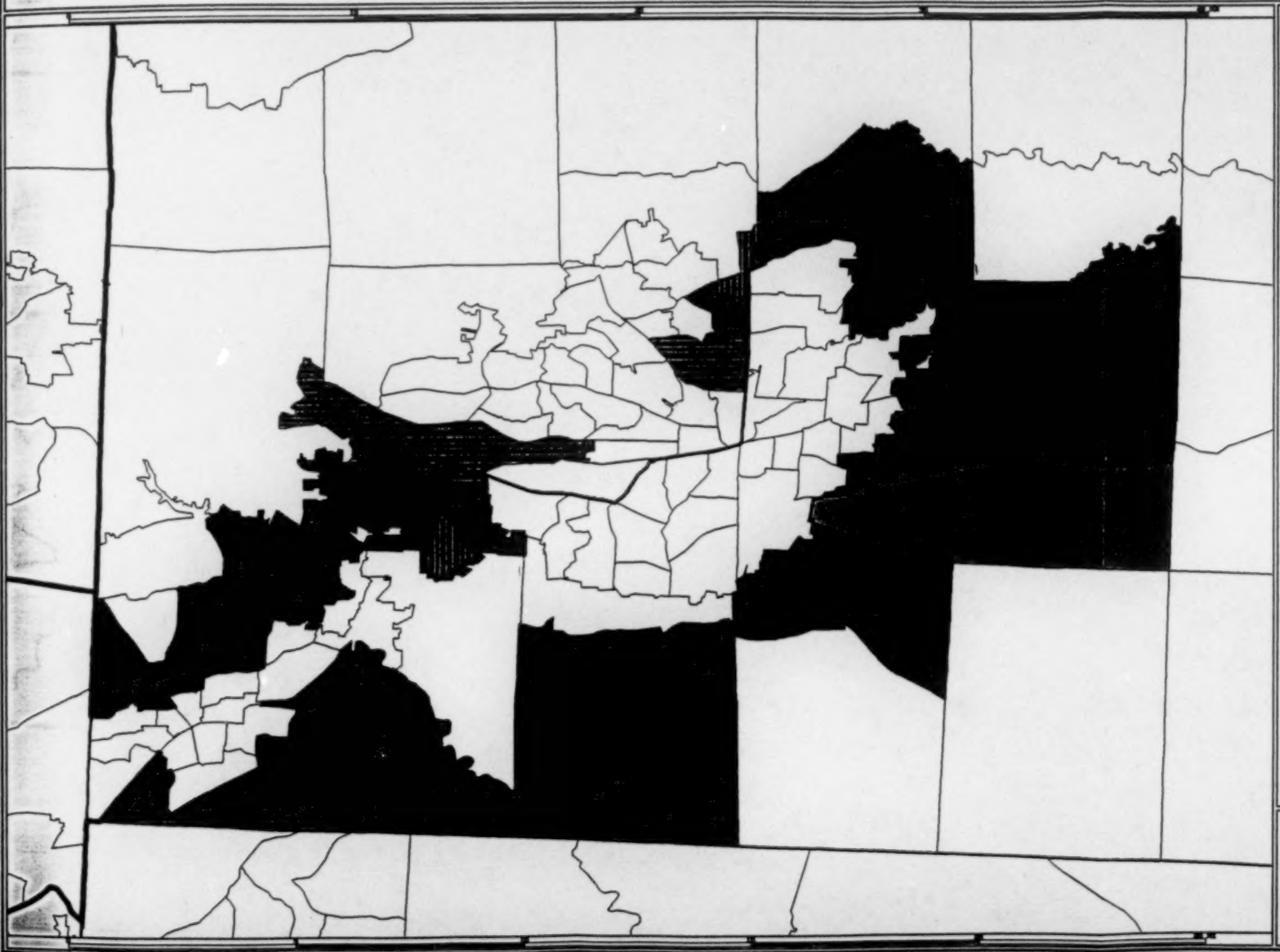
- County Boundary
- VTD boundary
- Dist. Boundary (H93)
- Dist. Boundary (C004)
- 3 Republican Victories
- 2 Republican Victories
- 0 Republican Victories

9a

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Republican Victories in Guilford County Precincts Abutting District 12



LEGEND

- County Boundary
- VTD boundary
- Dist. Boundary (H93)
- Dist. Boundary (C004)

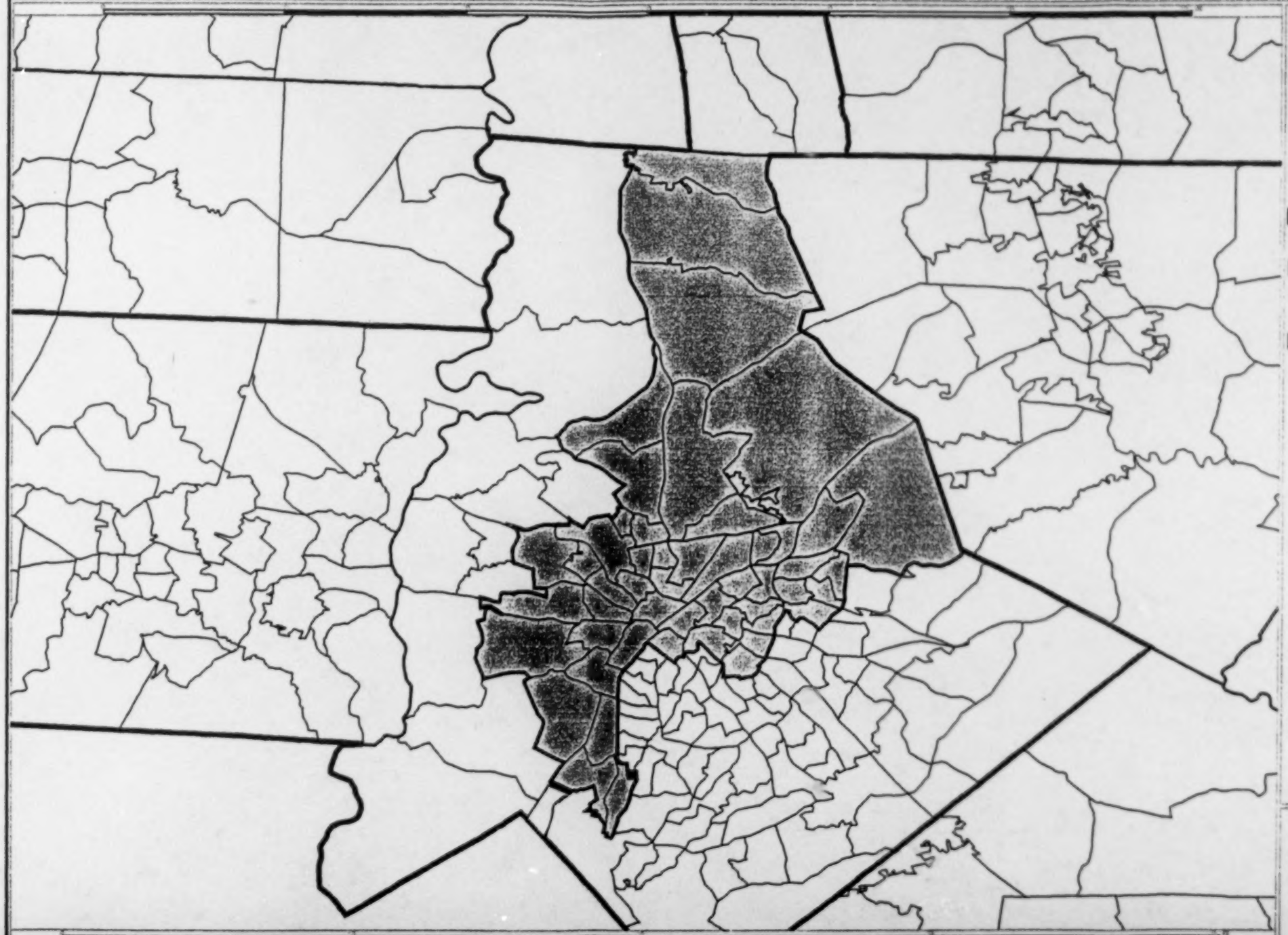
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

10a

December 22, 1998

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Mecklenburg County District 12 Precincts



LEGEND

- **County Boundary**
- **[illegible] Boundary**
- Dist. Boundary (H04)
- **Dist. Boundary (C004)**
- District 12
- Precincts Cited By Cromartie As "Excluded" From District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts (None In This County)

11a

December 22, 1998

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Forsyth County District 12 Precincts



LEGEND

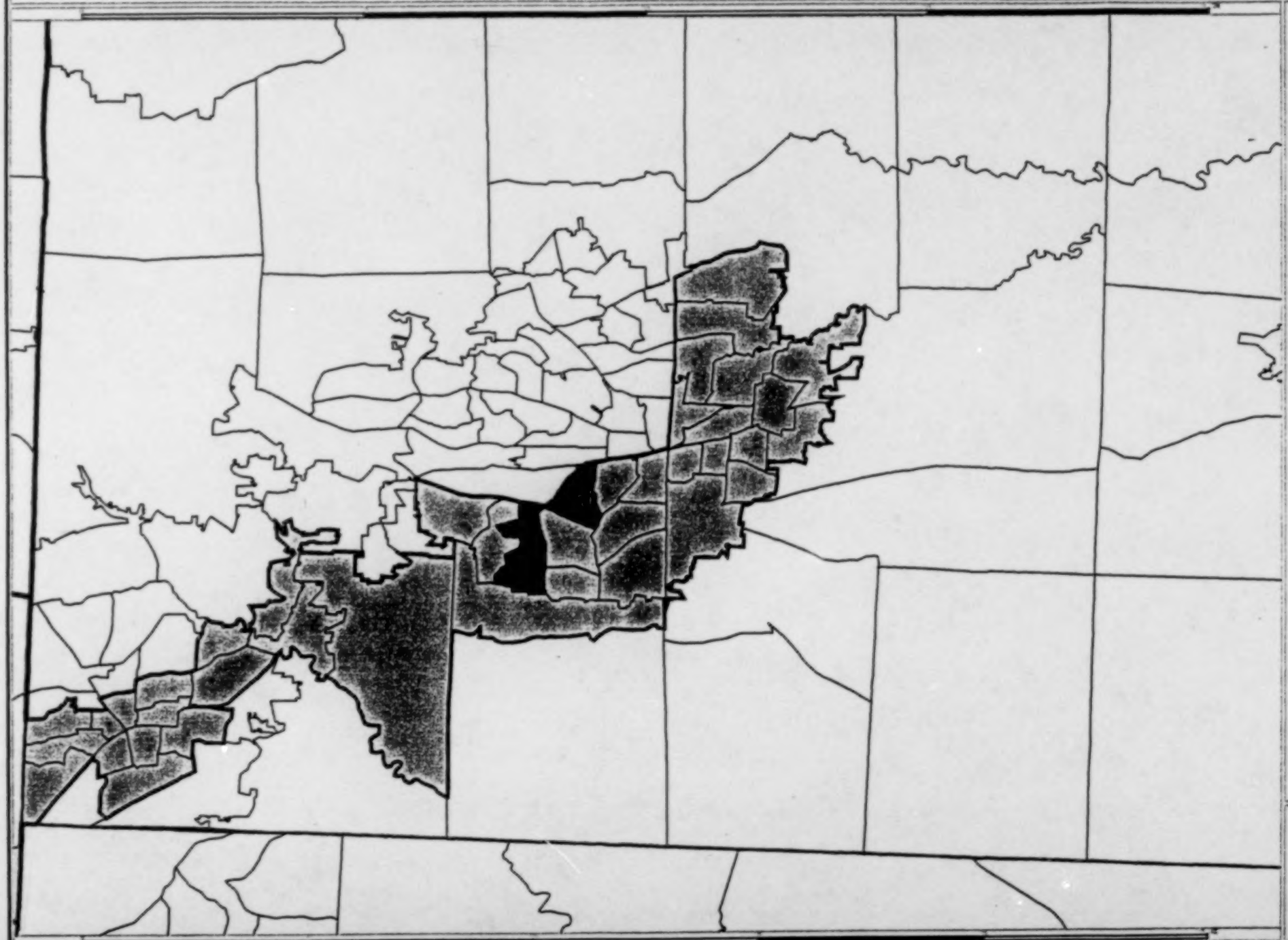
- **County Boundary**
- **[illegible] Boundary**
- Dist. Boundary (H93)
- **Dist. Boundary (C004)**
- District 12
- Precincts Cited By Cromartie As "Excluded" From District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

12a

December 22, 1998

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Guilford County District 12 Precincts



LEGEND

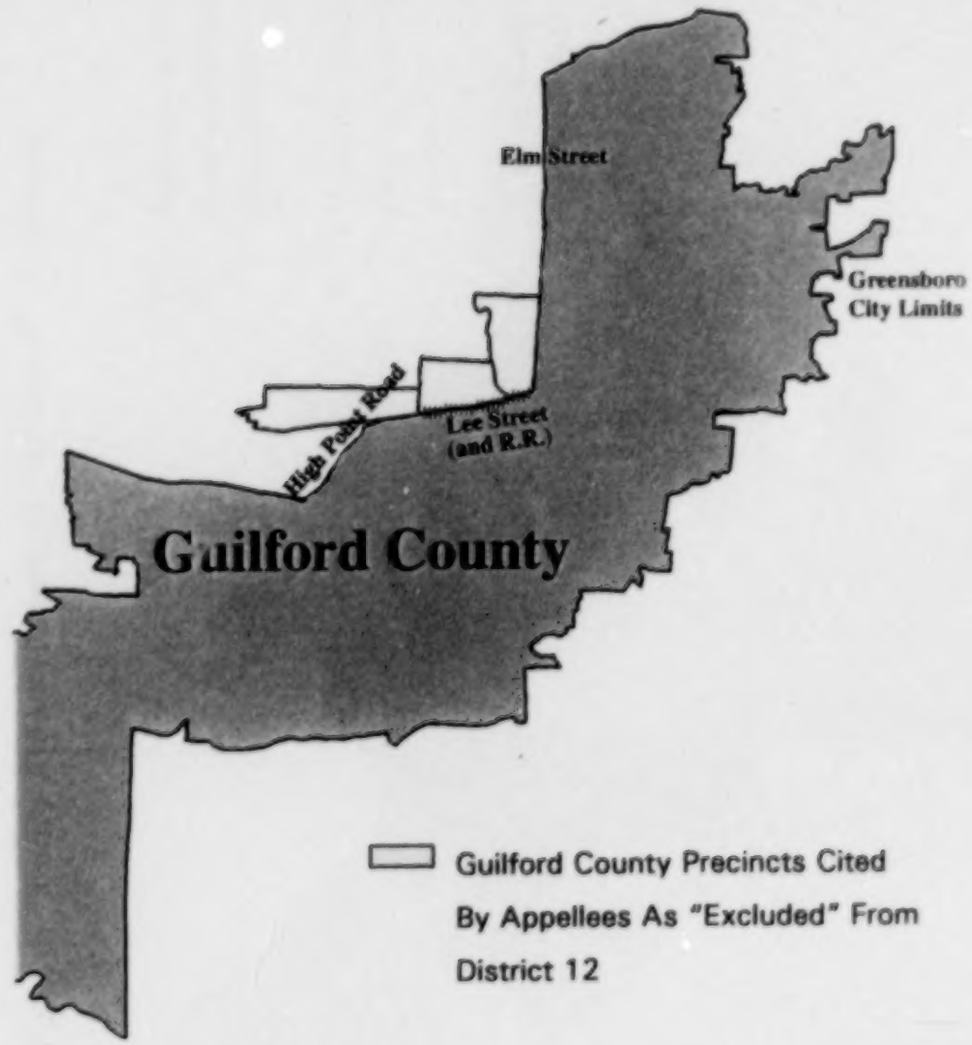
- **County Boundary**
- **VTD boundary**
- Dist. Boundary (H93)
- **Dist. Boundary (C004)**
- District 12
- Precincts Cited By Cromartie As "Excluded" From District 12
- District 12 Precincts With Lower Democratic Registration Than One Or More Adjacent Non-District 12 Precincts

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December 22, 1998

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Guilford County Precincts "Excluded" By Elm and Lee Streets



Forsyth County African-American "Excluded" Precincts

